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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MOYER PACKING COMPANY and DARLING-DELAWARE COMPANY, INC.,

Petitioners,

vs.

PETRUZZI'S INC. (formerly known as Petruzzi's IGA Supermarkets, Inc.),

Respondent.

Petition For a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Third Circuit's holding that plaintiffs asserting claims under Section 1 of the Sherman Act may survive summary judgment if there is ambiguous evidence that is "consistent with" a theory of conspiracy contravene this Court's decisions holding that such plaintiffs must proffer unambiguous evidence tending to exclude the possibility that defendants were acting independently?

2. Does the Third Circuit's decision create a conflict with the decisions of other Circuits applying this Court's decisions?

3. Does the Third Circuit's holding that direct evidence of competition may be construed as circumstantial evidence of collusion discourage competitive conduct, in violation of this Court's decisions?

PARTIES TO THE PROCEEDINGS

Respondent Petruzzi's, Inc. (formerly known as Petruzzi's IGA Supermarkets, Inc.) ("Petruzzi's") was the plaintiff in the district court. Petitioners Moyer Packing Company ("Moyer") and Darling-Delaware Company, Inc. ("Darling") are two of the original four defendants in the proceedings before the district court. The United States Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment in favor of a third defendant, The Standard Tallow Corporation, but reversed as to Moyer and Darling. A fourth defendant, Herman Isacs, Inc., was dismissed for lack of personal jurisdiction. Moyer and Darling have no parents or subsidiaries to be listed pursuant to Supreme Court Rule 29.1.

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Petition For a Writ of Certiorari to the
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For the Third Circuit

OPINIONS BELOW

This is a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a reported decision of that Court, entered on July 13, 1993, reversing the judgment of the district court granting summary judgment in favor of Petitioners. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc., et al.,* 998 F.2d 1224 (3d Cir. 1993). The Opinion and Judgment of the Third Circuit are included in the Appendix at pages A-1 and A-46, respectively.[1] The

1. References to materials included in the Appendix appear in this Petition as "A-[page number]."

Opinion and Order of the District Court are included in the Appendix at pages A-48 and A-106, respectively.

JURISDICTION

The judgment sought to be reviewed was entered on July 13, 1993. Accordingly, this Petition is timely filed pursuant to Supreme Court Rule 13.1 and 13.4.

This Court has jurisdiction to issue a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).[2]

FEDERAL STATUTES INVOLVED

The federal question in this case arises under Section 1 of the Sherman Act, which provides, in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

15 U.S.C. § 1.

STATEMENT OF THE CASE

Moyer and Darling are independent rendering companies (*i.e.*, rendering companies that are not part of a vertically-integrated conglomerate) who obtain "raw materials" consisting of bone, fat and meat scraps from suppliers such as plaintiff Petruzzi's. The suppliers, which are sometimes referred to as "accounts," generate such materials as waste or by-products. The renderers utilize the raw materials to produce various "finished products" such as grease, tallow, animal feed and fertilizer.

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2. The Third Circuit had appellate jurisdiction pursuant to 28 U.S.C. 1291. The district court had original subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337 and §§ 15 U.S.C. 15, 26.

Petruzzi's claimed in the district court that the defendant rendering companies conspired, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to artificially depress the prices paid to their existing suppliers within a geographic region consisting of certain sections of Pennsylvania, New Jersey and Connecticut.

The evidence suggested that the defendant renderers competed more actively for new suppliers than for each others' existing suppliers. The evidence also showed several instances of a renderer soliciting, or threatening to solicit, a competitor's existing suppliers, sometimes in retaliation against the latter's solicitation of the former's suppliers, and there was evidence that the defendant renderers refused to refrain from such retaliation. There was testimony suggesting that certain participants in the industry understood that such behavior constituted the "rules of the game" and that such "rules" were generally, although not invariably, followed.

Defendants maintained that their conduct was the result of independent decision making, motivated by a rational desire to retain existing suppliers and to avoid unnecessary and costly price wars. Petruzzi's' theory was that the defendant renderers' companies' general failure to bid on each others' existing suppliers was the result of an unlawful agreement to maintain an artificially low price to existing suppliers. To the extent there was competition for existing suppliers, Petruzzi's argued that such competition merely represented the defendants' retaliatory "enforcement" of the general "rules" against competing for each others' suppliers.

The district court granted defendants' motion for summary judgment, holding that Petruzzi's had not proffered sufficiently "unambiguous" evidence which would "tend to exclude the possibility" that defendants were acting independently, as required by this Court's decisions in *Monsanto Co. v. Spray-Rite Service Corp.*,

465 U.S. 752 (1984), and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). (A- 55, 57-59, 104.) The United States Court of Appeals for the Third Circuit reversed, except as to defendant Standard Tallow Corporation. *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Company, Inc., et al.*, 998 F.2d 1224 (1993) (A-46-47).

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit attempts to circumvent the well-established doctrine of this Court for addressing summary judgment motions in Section 1 cases, and creates a conflict with other Circuit Courts of Appeals. The decision of the Third Circuit thus impedes the uniform administration of important questions of federal antitrust law, encourages forum shopping, and disrupts interstate commerce.

The Third Circuit's decision also permits direct evidence of competition in one area to be construed as circumstantial evidence of illegal collusion in other areas where there is less competition. As a result, the decision discourages legal competition, thereby frustrating the very goals which the Sherman Act was intended to promote.

POINT I

THE THIRD CIRCUIT'S HOLDING THAT PETRUZZI'S WAS MERELY REQUIRED TO PROFFER EVIDENCE THAT WAS "CONSISTENT WITH" A THEORY OF CONSPIRACY CONTRAVENES THIS COURT'S DECISIONS IN *MONSANTO* AND *MATSUSHITA*

The basis for the Third Circuit's reversal of the district court lies in the following reasoning:

> [Petruzzi's] need demonstrate only that the prices paid by the defendants differed significantly between new and existing accounts for such data would be consistent with its theory that competition was restrained unlawfully only on existing accounts.

Petruzzi's, 998 F.2d at 1233 (A-14).

In *Matsushita*, this Court specifically instructed the Third Circuit that such reasoning is inconsistent with this Court's holding in *Monsanto*. The Third Circuit evidently does not agree with this Court, and persists in disregarding this Court's instructions in favor of creating a hospitable environment for antitrust plaintiffs. The Third Circuit's reasoning represents a radical departure from the paramount teaching of this Court in Section 1 cases:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. See also *Cities Service, supra,* at 280. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S. at 764.

Matsushita, 475 U.S. at 588.

Professor Areeda has noted that the *Matsushita* standard essentially requires a Section 1 plaintiff to provide evidence which reasonably suggests that it is "more likely than not" that a conspiracy exists, and that summary judgment is warranted "where the evidence, at best, is merely consistent with the existence of a conspiracy." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1405, at 988-99 (Supp. 1992) (hereafter "Areeda, *Antitrust Law*").

In *Matsushita*, this Court reversed the judgment of the Third Circuit because the Third Circuit had failed to "consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial." 475 U.S. at 581. In the present case,

the Third Circuit has committed the same error again, by holding that Petruzzi's was merely required to produce evidence that was "consistent" with Petruzzi's' theory, instead of asking whether the evidence was also consistent with independent business judgment, as required by *Matsushita.*

In an effort to find support for its unwillingness to follow *Matsushita*, the Third Circuit cited this Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 112 S.Ct. 2072, 2083 (1992), where this Court noted that *Matsushita* "did not hold that if the moving party enunciates any economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment." (A-10- 11). The Third Circuit erred, however, to the extent it interpreted *Kodak* as undermining the essential rule of *Monsanto* and *Matsushita. Kodak* followed *Matsushita,* and held merely that in a "tying" case under Sections 1 and 2 of the Sherman Act, where there was unambiguous (and evidently undisputed) evidence that defendant "implemented a policy of selling replacement parts . . . only to buyers of [defendant's] equipment who use [defendant's] service or repair their own machines," defendant was not automatically entitled to summary judgment by offering purported business "justifications" for its tying policies, which the jury could legitimately reject as pretextual. 112 S.Ct. at 2077-2078. *Kodak* would have application to the present case if, as in *Kodak*, there were unambiguous evidence that defendants had collusively adopted and implemented a policy against competing for each others' existing accounts, and defendants offered only purported "justifications" for such a policy. Here, however, there is no unambiguous evidence that defendants *had* such a policy; rather, Petruzzi's sought to infer the existence of such a policy from evidence of competition for new accounts and retaliatory competition for existing accounts, which is ambiguous at best with respect to whether defendants conspired to refuse to bid on each others' existing

accounts. *Matsushita* requires plaintiff to proffer *unambiguous* evidence tending to exclude the possibility that defendants would act as they do in the absence of conspiracy, not merely evidence that is as consistent with plaintiff's conspiracy theory.

POINT II

THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

A principal purpose for this Court's exercise of its certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals concerning the application of important provisions of federal law. *E.g., Braxton v. United States,* 111 S.Ct. 1854, 1857 (1991).

The Third Circuit's decision in this case conflicts with other Courts of Appeals that have abided by this Court's instructions and have refused to permit plaintiffs to proceed to trial with antitrust claims supported by ambiguous evidence that is as consistent with noncollusive conduct as it is with a theory of conspiracy. *E.g., H. L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.,* 879 F.2d 1005, 1016 (2d Cir. 1989) (summary judgment affirmed where evidence is equally consistent with permissible competition as with conspiracy because a "Section 1 conspiracy cannot be based upon speculation"); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.,* 878 F.2d 801, 806 (4th Cir. 1989) (summary judgment in favor of defendant in vertical conspiracy case where "evidence does not present a genuine issue of material fact as to whether the alleged conspirators acted independently" and criticizing Eighth and Eleventh Circuits for misconstruing *Matsushita* by equating the *Matsushita* "tends to exclude the possibility' of independent conduct" standard "to mean something like arguably consistent with the possibility of a conspiracy"); *In re Beef Industry Antitrust Litigation,* 907 F.2d 510, 514 (5th Cir. 1990)

(affirming summary judgment in favor of the defendants because the plaintiffs' evidence was "'as consistent with permissible competition as with illegal conspiracy'"); *Nurse Midwifery Associates v. Hibbett,* 918 F.2d 605, 616 (6th Cir. 1990), *reh'g denied en banc* 1991 U.S. App. LEXIS 498 (6th Cir. 1991), *cert. denied Nurse Midwifery Associates v. Hendersonville Community Hospital,* 116 L. Ed. 2d 355 (1991) (affirming summary judgment in favor of certain defendants because the plaintiff's evidence was as consistent with conspiratorial conduct as it was with unilateral conduct); *Market Force, Inc. v. Wauwatosa Realty Co.,* 906 F.2d 1167, 1174 (7th Cir. 1990) (summary judgment affirmed where plaintiff did not meet its burden of providing "'specific factual support for it allegations of conspiracy tending to show that the defendant was not acting independently' "); *H.J., Inc. v. IT&T,* 867 F.2d 1531, 1544-45, *reh'g denied* 876 F.2d 59 (8th Cir. 1989) (reversing plaintiff's jury verdict on the basis that the plaintiff failed to produce sufficient evidence tending to exclude the possibility of defendant's independent action); *Richards v. Neilsen Freight Lines,* 810 F.2d 898, 904 (9th Cir. 1987) (Kennedy, J.) (summary judgment in favor of defendants affirmed "[c]onduct that is as consistent with permissible competitive behavior as with illegal conspiracy does not, without more, support an inference of conspiracy"); *Gibson v. Greater Park City Company,* 818 F.2d 722, 724 (10th Cir. 1987) (affirming summary judgment for defendants because the plaintiff's "failed to present evidence that would tend to exclude the possibility that the alleged conspirators acted independently"); *Dunnivant v. Bi-State Auto Parts,* 851 F.2d 1575 (11th Cir. 1988).[3]

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3. *See also, e.g., Apex Oil Co. v. DiMauro,* 822 F.2d 246, 254 (2d Cir.), *cert. denied sub. nom.* 484 U.S. 977 (1987) (summary judgment affirmed as to certain defendants where an inference of conspiracy could only "amount to speculation" when the evidence leads to the plausible inference of both collusive and independent action); *International Distribution Centers, Inc. v. Walsh Trucking*

This Court recently declined to review another case suggesting that the Ninth Circuit may be departing from *Matsushita* in the same manner as the Third Circuit has done in this case. *See In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 906 F.2d 432, 439 (9th Cir. 1990) ("Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct"), *cert. denied* 111 S.Ct. 2274 (1991). The Third Circuit relied on *Petroleum Products* in the present case. *Petruzzi's,* 998 F.2d at 1231-33 (A-10-11).

Co., Inc., 812 F.2d 786, 795 (2d Cir.), *cert. denied* 482 U.S. 915 (1987) (denial of defendants' motion for j.n.o.v. reversed where plaintiff "failed to produce proof is not 'as consistent with permissible competition as with illegal conspiracy'"); *Consolidated Metal Products, Inc. v. American Petroleum Institute,* 846 F.2d 284, 294 (5th Cir. 1988) (affirming summary judgment in favor of defendant because the plaintiff failed to produce evidence that tended to exclude the possibility that the defendant's conduct amounted to "permissible competition and that the alleged conspirators acted independently"); *Health Care Equalization Commission v. Iowa Medical Society,* 851 F.2d 1020, 1032 (8th Cir. 1988) (affirming summary judgment in favor of the defendant because based upon the plaintiff's evidence, "an inference of conspiracy is no more reasonable than an inference that the [defendant] was not a part of any concerted activity"); *Key Financial Planning Corporation v. ITT Life Insurance Corporation,* 828 F.2d 635, 640 (10th Cir. 1987) (affirming summary judgment for defendants where the plaintiff's evidence was "at least as consistent with the permissible independent interests of the defendants" as it was with respect to collusion); *Winn v. Edna Hibel Corporation,* 858 F.2d 1517, 1520 (11th Cir. 1988) (directed verdict in favor of defendant affirmed because even though the evidence supporting a conspiracy was economically reasonable, the plaintiff failed to exclude the possibility that the defendant acted unilaterally or independently); *Ferguson v. Greater Pocatello Chamber of Commerce,* 848 F.2d 976 (9th Cir. 1988); *Souza v. Estate of Bishop,* 821 F.2d 1332 (9th Cir. 1987).

Petitioners respectfully submit that this Court should now settle this issue to avert a burgeoning conflict among the Circuits. The Third and Ninth Circuits, both encompassing some of the highest concentrations of economic activity in the nation, have now held themselves out as hospitable forums for the most far-fetched theories of antitrust conspiracy, and have invited plaintiffs to proceed to jury trials with ambiguous evidence that does not tend to exclude the possibility that defendants were acting independently, so long as such evidence is consistent with a speculative theory of conspiracy. Such a result conflicts with the decisions of other Circuits that have followed this Court's instructions in *Monsanto* and *Matsushita*. It is fair to predict that, left uncorrected, such decisions will encourage large-scale forum shopping by antitrust plaintiffs who will seek out the Third and Ninth Circuits, and that frustrated business enterprises will flee or fail in response.

Certiorari should be granted to heal the growing rift between the Courts of Appeals and assure the uniform application of critical principals of federal antitrust law.

POINT III

BY PERMITTING DIRECT AND UNDISPUTED EVIDENCE OF COMPETITION TO BE CONSTRUED AS CIRCUMSTANTIAL EVIDENCE OF COLLUSION, AND BY FAILING TO INQUIRE AS TO WHETHER THE EVIDENCE IS SUFFICIENTLY UNAMBIGUOUS TO EXCLUDE THE POSSIBILITY OF INDEPENDENT CONDUCT, THE THIRD CIRCUIT'S DECISION CHILLS LEGAL COMPETITION

The Third Circuit reasoned that "more liberal inferences from the evidence should be permitted than in *Matsushita*" because, according to the Third Circuit, (1) "the plaintiff's theory of conspiracy is not implausible," and (2) "defendants' challenged activities are not procompetitive." *Petruzzi's,* 998 F.2d at 1232 (A-9-10). Both bases for the Third Circuit's decision are contrary to *Monsanto* and *Matsushita.*

A. The Defendants' Challenged Conduct Is Procompetitive.

The Third Circuit's adoption of a standard in conflict with this Court's decisions in *Monsanto* and *Matsushita* has resulted in a decision that permits direct and undisputed evidence of competition to be construed as circumstantial evidence of unlawful collusion.

The Third Circuit recognized that the standard enunciated in *Monsanto* and *Matsushita* is intended to preclude conspiracy theories that "chill procompetitive behavior." *Petruzzi's,* 998 F.2d at 1232 (A-9). *See,* Matsushita, 475 U.S. at 594. The Third Circuit dismissed this concern in this case, asserting that "the defendants' challenged activities are not procompetitive. After all, refusing to bid on accounts hardly can be labelled as the 'very essence of competition'." *Id.* (A-12).

Yet, two pages later in its opinion, the Third Circuit recognized that the conduct directly challenged by Petruzzi's was *not* defendants' alleged refusal to bid on

each others' accounts, for Petruzzi's had no direct evidence of such a refusal. Rather, Petruzzi's challenged certain *competitive* behavior, *i.e.*, defendants' undisputed competition for new accounts and alleged "retaliatory" competition for existing accounts. From this, Petruzzi's sought to draw an inference that defendants have agreed to refuse, rather than merely independently deciding to refrain, from bidding on each others' existing accounts. The Third Circuit reasoned:

> [T]o the extent that there is testimony regarding the defendants pricing above market, it is relevant not to establish a predatory pricing violation by a particular defendant, but to show the enforcement mechanism used by the defendants to enforce their agreement. Instances of predatory pricing, therefore, are circumstantial evidence that an unlawful agreement exists.

998 F.2d at 1233 (A-15).

By permitting evidence establishing that defendants competed actively for new accounts, and on occasion competed aggressively with competing renderers for existing accounts, to be construed as evidence of an alleged conspiracy to keep prices artificially low, the Third Circuit has again made the very error for which it was admonished in *Matsushita*. As in *Matsushita*, the Third Circuit's reasoning is actually *anti-competitive* because it discourages manufacturers from competing for raw materials where it makes economic sense to do so, for fear that such competition will be construed as evidence of ā conspiracy not to compete where there is little or no incentive to do so. *Matsushita*, 475 U.S. at 593.[4]

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4. Commentators have observed that:

> It is evident that the *Matsushita* majority . . . wished to expand the *Monsanto* standards to prevent the use of ambiguous evidence as basis for liability where the consequences of mistaken inferences might be to deter other types of procompetitive conduct, such as low pricing, or

Moreover, such a holding permits liability to be imposed upon defendants for engaging in conduct that did not harm the plaintiff. Indeed, Petruzzi's cannot possibly have been injured by the conduct from which the Third Circuit drew inferences of illegal collusion. Both the defendants' competition for new accounts and alleged "retaliatory" competition for competitors' existing accounts necessarily resulted in *higher* prices being paid to the suppliers that were directly affected.[5]

As in *Matsushita,* the Third Circuit has again erred in permitting a theory of antitrust liability to be based upon competitive conduct that did not injure the plaintiff.

B. The Third Circuit Erroneously Failed to Consider Whether the Evidence was Ambiguous.

1. Plaintiff Must Proffer Unambiguous Evidence Tending to Exclude the Possibility that Defendants' Conduct was Noncollusive Regardless of Whether Plaintiff's Conspiracy Theory is Plausible.

The Third Circuit suggested that it was unnecessary to determine whether Petruzzi's evidence was "ambiguous" because, according to the Third Circuit, Petruzzi's' theory "is not implausible." *Petruzzi's,* 998 F.2d at 1233 (A-10-11).

The Third Circuit erred to the extent it viewed the implausibility of plaintiff's theory to be a prerequisite to the application of the principles of *Matsushita* and

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competitively neutral conduct, such as the refusal to deal at issue in *Cities Service*, on which the *Matsushita* majority relied.

Susan S. DeSanti and William E. Kovacic, *Matsushita: Its Construction and Application by the Lower Courts,* 59:2 ANTITRUST LAW JOURNAL 609, 614 (ABA 1990).

5. In fact, Petruzzi's stipulated that it decided to stop selling to Moyer in favor of a competitor that offered a higher price, but changed its mind and continued selling to Moyer after Moyer offered more money. *See* Stipulation, R. 450-451.

Monsanto. Moreover, the Third Circuit erred because it failed to recognize that, under *Matsushita,* Petruzzi's theory *was* implausible as a matter of law. Finally, the Third Circuit erred because the evidence was ambiguous at best.

In *Matsushita*, plaintiffs alleged that the defendant electronic products manufacturers were engaged in "predatory" below market pricing in the United States and were supporting that effort by charging above market prices in Japan. 475 U.S. at 578. The district court granted summary judgment for defendants but the Third Circuit reversed. In reversing the Third Circuit, this Court held that the Third Circuit had erred to the extent it found that evidence of above-market prices in Japan could be construed as evidence of a conspiracy to charge "predatory" below-market prices in the United States. 475 U.S. at 583.

This Court's holding was predicated upon the following two errors: "(i) the 'direct evidence' on which the court relied had little, if any, relevance to the alleged predatory pricing conspiracy, and (ii) the court failed to consider the absence of a plausible motive to engage in predatory pricing." *Id.* at 595.

Thus, while it is undoubtedly true that an implausible theory of conspiracy is not likely to survive summary judgment under the *Matsushita* standard, it does not follow that an arguably plausible conspiracy theory is exempt from the requirements of *Matsushita,* as the Third Circuit reasoned in this case.

Matsushita does not hold that if plaintiff's theory is plausible, ambiguous evidence will suffice; rather, *Matsushita* requires the court to determine whether the evidence is ambiguous, and, if so, whether it is as consistent with a plausible theory of independent business conduct as it is with a theory of conspiracy. Similarly, in *Monsanto*, this Court's emphasis was not on the plausibility of the plaintiff's theory, but on the ambiguity of the evidence from which plaintiff sought to draw an inference of conspiracy. *Monsanto,* 465 U.S. at

762-64. Neither *Matsushita* nor *Monsanto* holds that a finding that plaintiff's conspiracy theory is "implausible" is a prerequisite to requiring plaintiff to produce "unambiguous" evidence tending to exclude the possibility of independent conduct, as the Third Circuit erroneously held in the present case. *Petruzzi's,* 998 F.2d at 1232 (A-10-11).

2. Petruzzi's Theory is Implausible as a Matter of Law.

Moreover, the Third Circuit's conclusion that Petruzzi's conspiracy theory is not implausible is directly contrary to this Court's holding in *Matsushita* that antitrust claims (such as Petruzzi's) which depend upon allegations of "predatory pricing" and "refusal to deal" are, by nature, implausible, because they require an inference that defendants would forego certain profits in the short run in favor of uncertain profits in the future.[6]

In *Matsushita,* this Court instructed:

> Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Servic supra*, at 289.[7]
>
> It follows from these settled principles that if the factual context renders respondents' claim implausible — if the claim is one that makes no economic sense — respondents must come forward with more persuasive evidence than would otherwise be necessary. *Cities Service* is instructive. The issue in that case was whether proof of the defendant's refusal to deal with the plaintiff supported an

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6. Indeed, the Third Circuit recognized that above-market pricing is contrary to self-interest, but, curiously, considered the implausibility that defendants would agree to engage in such conduct to be evidence of an agreement. 998 F.2d at 1245 (A-28).

7. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

> inference that the defendant willingly had joined an illegal boycott. Economic factors strongly suggested that the defendant had no motive to join the alleged conspiracy. 391 U.S., at 278-79. The Court acknowledged that, in isolation, the defendant's refusal to deal might well have sufficed to create a triable issue. *Id.*, at 277. But the refusal to deal had to be evaluated in its factual context. Since the defendant lacked any rational motive to join the alleged boycott, and since its refusal to deal was consistent with the defendant's independent interest, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*, at 280.

475 U.S at 587.

In reversing the Third Circuit's judgment in *Matsushita* and remanding the case for further proceedings, this Court held that the "predatory pricing" theory in that case, like the "refusal to deal" theory in *Cities Service*, was "by nature speculative" and implausible, because it required an inference that the defendants would forego certain profits that could be realized in the short run by selling at a market price, in exchange for uncertain profits that might accrue in the future if the defendants succeeded in monopolizing the market. 475 U.S. at 588-593.

Here, the Third Circuit has again followed the same reasoning rejected by this Court in *Matsushita*. Petruzzi's claimed that defendants agreed to refuse to bid on other renderers' existing accounts, and engaged in "predatory" over-market pricing to "retaliate" against renderers who bid on competitors' accounts. Thus, Petruzzi's' claim depends upon allegations of a refusal to deal, as in *Cities Service*, as well as allegations of "predatory pricing," as in *Matsushita*. The "predatory pricing" theory in the context of this case would require defendants to pay above market prices for raw materials in the hopes of deterring future competition by other renderers. The "refusal to deal" theory first assumes that

defendants had excess capacity that was not being filled by the supply available from new and existing accounts (*i.e.*, it assumes that they needed the supply provided by competitors' accounts). Next, the theory assumes that defendants agreed to forego the increased market share that could be achieved by successfully competing for a larger share of a limited supply of raw materials, in the hopes of maintaining a higher profit margin on a smaller volume. Both theories are equally implausible, because they require an inference that defendants would forego their immediate self-interest in favor of uncertain future benefits. Petruzzi's' claim, which depends upon both theories, is doubly implausible.

C. The Evidence that Defendants Compete More for New Suppliers Than for Existing Suppliers is Ambiguous at Best, and is At Least as Consistent With Independent Conduct as it is with Petruzzi's Conspiracy Theory.

The Third Circuit reasoned: "The results of the multiple regression analysis show a price differential between new and existing accounts. . . . [T]here is no rational way to explain this difference." *Petruzzi's,* 998 F.2d at 1241 (A-31). Even assuming the price differential supports an inference that there was more competition for new accounts than for existing accounts, however, a plaintiff in a Section 1 case is required to do more than establish a relative lack of competition. The plaintiff must produce sufficient unambiguous evidence tending to exclude the possibility that the lack of competition was the result of independent business judgment. *Matsushita,* 475 U.S. at 588. The relative lack of competition for existing accounts suggests, at most, parallel behavior; it does not tend to exclude the possibility that such parallel behavior is the result of independent decision making.

The Third Circuit recognized that "mere consciously parallel behavior is not a sufficient basis from which to infer concerted action. Instead, courts require

'plus' factors because otherwise the evidence is equally consistent with legal behavior."[8] 998 F.2d at 1244 (A-26). The Third Circuit further noted that, although "a plaintiff can survive summary judgment if it shows that the defendants had a motive to conspire and acted contrary to their self-interest":

> Professor Areeda cautions against blindly applying these "plus" factors, lest they become meaningless. *See* VI Areeda, *Antitrust Law* ¶ 1434c, at 214-15. For instance, it is quite likely that oligopolists acting independently might sell at the same above- marginal cost price as their competitors because the firms are interdependent and competitors would match any price cut. Therefore, they quickly learn that price cuts do not increase market share and go back to their noncompetitive pricing. Accordingly, Areeda warns courts not to consider a failure to cut prices or an initiation of a price rise as an action against self-interest because it also reflects the interdependence of the industry. *See id.*

Petruzzi's, 998 F.2d at 1244 (A-27).

The Third Circuit determined that Professor "Areeda's concerns are not germane here because we are not dealing with parallel pricing. Rather, we are

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8. The Third Circuit further observed that:

> . . . Professor Areeda suggests the easiest "plus" factor to explain is evidence implying a traditional conspiracy. *See* VI Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1434b, at 214 (1986) [hereinafter Areeda, *Antitrust Law*]. The testimony of Ebersole and Salisbury, the Ryder tapes, and the economic data discussed above satisfies this requirement.

Petruzzi's, 998 F.2d at 1244 (A-26).

As set forth below, the evidence which the Third Circuit viewed as "implying a traditional conspiracy" actually established nothing more than an *absence* of an agreement to refrain from "retaliatory" competition and is at least as consistent with a theory of mere consciously parallel conduct as it is with a theory of "traditional conspiracy."

dealing with refusals to bid on existing accounts as aggressively as new accounts." *Id.*, 998 F.2d at 1244 (A-27). The Third Circuit failed, however, to provide any logical basis for recognizing the role of interdependence in selling decisions, but not in buying.[9]

The Third Circuit recognized that:

> The defendants have justified their behavior by arguing that they did not want to induce a price war or retaliation. Thus, they argue that their behavior merely reflects their interdependence. The district court accepted this argument. *See* Opin. at 27. ("Further, attempts to lure an account away from another renderer were likely to incur the wrath of that renderer and bring about a retaliatory strike against one of the aggressor's own accounts.")

Id., 998 F.2d at 1244-45 (A-27).

The Third Circuit rejected this explanation because, according to the Third Circuit, "there is no reason that bidding on each others' accounts should start a price war anymore than bidding on new accounts should trigger one. One logical explanation is that the defendants set up the rules this way." *Id.*, 998 F.2d at 1245 (A-27). However, the Third Circuit erred in failing to recognize another, equally plausible, explanation: the defendants independently understood that it was in their collective self-interest to refrain from competing for each others'

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9. The Third Circuit noted that " the kind of behavior found in parallel interdependent decisions as to basic price and similar price matters should not be deemed an unlawful conspiracy; but that parallel interdependent decisions to adopt rigid delivered-price systems, to indulge in practices patently exclusionary of competitors, and to impose resale price maintenance, may appropriately be condemned on a conspiracy charge'." 998 F.2d at 1244 (A-27). This case does not, however, involve allegations of any such practices, but involves "interdependent decisions as to basic price" to be paid for raw materials.

suppliers, and in their individual self-interest to engage in "retaliatory" competition to protect existing suppliers.

Economic factors strongly support defendants' theory of interdependence. It has been recognized that:

> Any realistic theory of oligopoly must take as a point of departure the fact that when market concentration is high, the pricing decisions of sellers are interdependent and the firms involved can scarcely avoid recognizing their mutual interdependence. If they are at all perceptive, the managers of oligopolistic enterprises will recognize too that profits will be higher when cooperative policies are pursued than when each firm looks only after its own narrow self-interest. As a consequence, we should expect oligopolistic industries to exhibit a tendency toward the maximization of collective profits, perhaps even approaching the pricing outcome associated with pure monopoly. Such coordination of pricing policies is not easy, especially when cost and market share disparities engender conflicting price and output preferences among industry members. Factors conducive to cooperation include free and rapid interfirm communication, repetitive transactions, and the cultivated expectation that price cuts will be promptly countered.

F.M. Scherer, *Industrial Market Structure and Economic Performance,* at 168 (2d ed. 1980).[10]

Accordingly, it would be expected that the defendant renderers independently would recognize the collective benefits of refraining from engaging in price

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10. The Third Circuit's conclusion that the price differential established by Petruzzi's expert's regression analysis was only consistent with a theory of conspiracy was the result of the Third Circuit's analysis of economic factors outside the record before the district court. Thus, it is appropriate to evaluate the correctness of the Third Circuit's economic analysis.

competition for each others' suppliers, and would independently expect that any such forays would be quickly countered, perhaps even with above-market "retaliation."

Although, as the Third Circuit recognized, such behavior is consistent with the existence of a cartel, in the context of an oligopoly it is equally consistent with independent conduct.

> Indeed, large firms may decide independently to behave as though they had a cartel arrangement without a formal meeting; that is, each one can cut its output and hope that the others will do likewise, thereby creating an informal cartel. Inevitably, in oligopolies, firms take their rivals' actions into account. . . . When firms in an oligopoly coordinate their actions as if they were a cartel without an explicit arrangement, the resulting coordination is sometimes referred to as **tacit collusion**[11] or **conscious parallelism.**

Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization,* at 221 (1990) (emphasis in original).

> As the only firm in an industry, a monopolist has no rivals. At the other extreme, individual competitive firms are too small to affect the industry's price, so each firm can reasonably ignore the actions of any other; only the industry's collective actions matter to a competitive firm. In contrast, because there are only a few firms in an oligopoly, each firm can affect market price and hence its rivals' profits: Ford

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11. "The idea behind *tacit collusion* is that firms in an industry can collude, or, more properly, attain the kind of outcome that is usually associated with collusion, in the absence of any kind of agreement or even discourse. Somehow, all firms know what is in their best interest, and without explicit coordination, they do the right thing." James W. Friedman, *Oligopoly Theory*, at 132 (1983).

> cannot and does not ignore General Motors or Honda when making decisions. Thus, oligopoly differs from competition and monopoly in that a firm *must* consider rival firms' behavior to determine its own best policy.

The Third Circuit concluded that Petruzzi's had demonstrated more than merely parallel conduct because the Court found that it was against defendants' self-interest to refuse to bid on a competitor's account, "especially when they could beat the price." *Petruzzi's,* 998 F.2d at 1245 (A-27). The Third Circuit did not explain, however, why it would be in a renderer's best interest to pay *more* for raw materials simply because it is able, or why it would be contrary to self-interest to refrain from doing so where to do so would risk retaliation and, ultimately, a costly price war.

Thus, the Third Circuit erred in concluding that a defendant's failure to bid on competitors' accounts was plausible only if defendants "have some problem like capacity or they know that the existing price is too high." *Id.,* 998 F.2d at 1245 (A-27). To the contrary, an *equally plausible* explanation for defendants' failure to bid on each others' accounts is that they each independently recognized that the immediate economic consequences of challenging competitors for their accounts would not justify uncertain potential economic benefits.[12] *(See, e.g.,* testimony of Norbert Carlstrom, R. 797-98).

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12. *See also* Jean Tirole, *The Theory of Industrial Organization,* at 240 (1988):

> Consider a small number of identical firms producing a homogeneous product. Chamberlin conjectured that in such a situation the firms in the industry would charge the monopoly price, i.e., the price that maximizes industry profit:
>
> > If each seeks his maximum profit rationally and intelligently, he will realize that when there are only two or a few sellers his own move has a considerable effect upon his competitors, and that this makes it idle to suppose that they will accept without retaliation the losses he forces upon them. Since the result of a cut by any one is inevitably to decrease his own profits, no one will cut, and

Similarly, the Third Circuit erred in concluding that a renderer's retaliation against competitors that solicit the renderer's accounts is contrary to economic self-interest. *Petruzzi's,* 998 F.2d at 1245 (A-28). The Third Circuit failed to appreciate that defendants in this case are *buyers* of plaintiff's raw materials; not sellers in competition with plaintiff, as in *Matsushita.* While there may be scant rational business justification for selling at below market prices, the same cannot be said for paying high prices to targeted accounts in an effort to protect existing accounts.[13]

Here, the evidence established that the defendant renderers often make a substantial investment in soliciting an account and maintaining its trust and goodwill. (R. 793-95). Having made such an investment to win the account and maintain its loyalty, a renderer will quite rationally compete more aggressively to keep the account than it would to win a new account in which no such investment has been made, and can rationally assume that competitors will behave the same way.

Moreover, accepting Petruzzi's' experts' theory that new accounts command a higher price than existing accounts, it makes economic sense for a renderer to attempt to protect its existing accounts, regardless of the investment made in the account. Even if "retaliatory" competition against a competitor requires a renderer to pay above-market prices to the accounts which it targets, such an effort is rational because it will discourage the competitor from soliciting other existing accounts to whom the renderer is paying prices which are below the price that the renderer would have to pay if it were compelled to replace its suppliers with new accounts.

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although the sellers are entirely independent, the equilibrium result is the same as though there were a monopolistic agreement between them. (1933, p. 48).

13. *See Petruzzi's,* 998 F.2d at 1245 (A-28), wherein the Third Circuit confused the defendant renderers' position with that of the plaintiffs in *Matsushita.*

Thus, not only does it make economic sense for a renderer to protect its existing accounts, it also makes sense for renderers to assume that a competitor will do the same and to conclude that a competitor's account is therefore potentially a costlier, and hence less attractive, prospect than a new account, even if the competitor's account is presently commanding a lower price than would be commanded by a new account. *See, e.g.,* R. 2088-89.

Moreover, it bears repeating that such alleged "retaliation" is *competition*, resulting in a higher price paid to the targeted suppliers. Section 1 of the Sherman Act does not prohibit such competition, but seeks to protect it. 15 U.S.C. § 1.

Certiorari should be granted because defendants' challenged conduct is at least as consistent with defendants' theory of interdependence as it is with plaintiff's theory of conspiracy.

D. The Deposition Testimony Established, at Most, that Defendants Did Not Agree to Refrain from Competing Aggressively Against Renderers who Initiated Competition for Existing Suppliers.

Although the Third Circuit's holding that Petruzzi's was only required to produce evidence that was consistent with its conspiracy theory is, in and of itself, compelling grounds for granting certiorari, it is clear that the Third Circuit's adoption of a fundamentally erroneous conceptual framework irrevocably tainted that court's evaluation of the record evidence by precluding any inquiry as to whether the evidence was sufficiently ambiguous to be consistent with independent activity.

A review of the Third Circuit's discussion of the evidence proffered by Petruzzi's reveals only that the

defendant renderers (1) competed more for new accounts than for existing accounts,[14] (2) understood that soliciting each others' suppliers would be likely to incite "retaliatory" competition,[15] and (3) did *not* agree to refrain from engaging in such retaliation.[16] None of the evidence suggests unambiguously that any renderer ever agreed not to solicit another renderer's suppliers, nor does the evidence unambiguously tend to exclude the possibility that defendants acted independently.

As set forth above, it is anticompetitive and thus impermissible under *Matsushita* to infer an agreement not to compete from evidence of competition. *Matsushita,* 475 U.S. at 594.

E. The Expert Reports did Not Create a Genuine Issue of Material Fact.

Petruzzi's' economists purported to render an opinion that the evidence, including evidence that the Third Circuit agreed was irrelevant and inadmissible, established the existence of a conspiracy between the defendants. However, the district court had already correctly concluded that Petruzzi's had not produced sufficient unambiguous evidence to exclude the possibility that defendants were acting independently. Accordingly, with respect to the ultimate issue of the existence or nonexistence of a conspiracy, the expert opinion "add[ed] nothing to the evidence." (A-104).

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14. Petruzzi's' economists' price study established that higher prices were paid to new accounts than to existing accounts. Arguably, this evidence, coupled with the testimony of defendants' solicitors, supports an inference that defendants competed more for new accounts than for existing accounts. There was ample evidence of defendants' competing for each other's existing accounts, however. *E.g.,* R. 827, 857-59, 861-64, 2232, 2337, 2370-71, 2381-82, 2179-81.

15. *E.g.,* testimony of Salisbury and Ebersole, discussed in the Third Circuit's opinion, 998 F.2d at 1233-35 (A-11-13).

16. *E.g.,* the "Ryder Tapes," discussed by the Third Circuit, 998 F.2d at 1235-36 (A-13-15).

In *Matsushita*, this Court reasoned as follows:

> Respondents also rely on an expert study suggesting that petitioners have sold their products in the American market at substantial losses. The relevant study is not based on actual cost data; rather, it consists of expert opinion based on a mathematical construction that in turn rests on assumptions about petitioners' costs. The District Court analyzed those assumptions in some detail and found them both implausible and inconsistent with record evidence. . . . Although the Court of Appeals reversed the District Court's finding that the expert report was inadmissible, the court did not disturb the District Court's analysis of the factors that substantially undermine the probative value of that evidence. . . . We find the District Court's analysis persuasive. Accordingly, in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational.

475 U.S. at 594, n. 19 (citations omitted).

In the present case, as in *Matsushita*, the district court found the plaintiff's expert testimony to be both implausible and inconsistent with the record evidence, and excluded the proposed expert opinions. As in *Matsushita*, the Third Circuit reversed. For essentially the same reasons as in *Matsushita,* the Third Circuit erred.

Although the Third Circuit recognized that "the [experts' pricing study] alone may not be enough to raise a jury issue," 998 F.2d at 1241 (A-22), the Third Circuit concluded that the pricing study alone created a genuine issue of fact because "in a homogeneous industry it does not make sense for a company to differentiate in price between new and existing accounts." 998 F.2d at 1239 (A-19). However, the record was certainly not "unambiguous" with respect to whether defendants provided a "homogeneous" service, which the Third Circuit acknowledged provided the "linchpin for the

experts' theory." *Petruzzi's,* 998 F.2d at 1239 (A-19). Indeed, such a theory was implausible and contrary to the evidence. As in *Matsushita*, "the expert opinion evidence . . . has little probative value in comparison with the economic factors" discussed above establishing that (1) plaintiff's theory of conspiracy is implausible, and (2) defendants' behavior is completely consistent with a theory of interdependence. *See Matsushita,* 475 U.S. at 594, n. 19.

The Third Circuit's assumption that defendants provide a "homogeneous service" is the sole basis for its conclusion that the price differential between new and existing accounts can only be explained by an inference of collusion. 998 F.2d at 1236 (A- 21). Clearly, however, if there were truly no differences between renderers, suppliers of raw materials would be highly motivated to constantly attempt to secure a higher price from competing renderers. Furthermore, the assumption that the defendants delivered a "homogeneous service" is contrary to the record evidence that some renderers offered loans, bonuses, equipment and other incentives to suppliers, and called on them often, while others did not. Compare R. 793-95, 943, 1085, 2234-35, 2384-85.

Absent plaintiff's theory of collusion, the absence of price competition for existing suppliers compels the conclusion that the "service" provided by defendants was *not* "homogeneous," and that price was not the only factor that was important to suppliers. Moreover, there was evidence about important differences in the service provided by competing renderers. R. 2218-19. One account was so happy with its existing buyer that "it would not change for anything." R. 2199. Although plaintiff's theory assumes that the competing renderers agreed to refuse to buy from a competitor's supplier, as set forth above, the evidence of such an agreement is ambiguous at best. Indeed, the Third Circuit was aware of evidence to the contrary, *e.g.,* testimony that the "way of doing business" in the industry permitted renderers to "go after" a competitor's accounts if the renderer received calls from them. 998 F.2d at 1244 (A-26).

The fact that plaintiff's experts based their opinion that a conspiracy existed upon an assumption of homogeneity cannot be sufficient to create a genuine issue for trial where, as here, the evidence is at best ambiguous, and in fact is inconsistent with such an assumption. Here, as in *Matsushita,* the expert reports, to the extent they established anything beyond the mere differential between prices paid to new and existing accounts, rested upon an assumption that was implausible and contrary to the evidence. Such testimony, alone or in combination with the other evidence discussed above, did not unambiguously tend to exclude the possibility that defendants' failure to bid on each others' accounts was motivated by a rational desire to avoid costly and unnecessary price wars, rather than an agreement.

Defendants respectfully submit that if the proposed expert testimony in this case is sufficient to preclude summary judgment, all a plaintiff in a Section 1 case would ever be required to do to avoid summary judgment would be to proffer an expert to testify that the evidence proves a conspiracy. According to the Third Circuit, even if there is insufficient unambiguous evidence to tend to exclude the possibility of independent conduct, if plaintiff's expert opines otherwise, the case must go to the jury.

Such a doctrine frustrates the goals of Rule 403 of the Federal Rules of Evidence, and Rule 56 of the Federal Rules of Civil Procedure and is contrary to this Court's decision in *Matsushita.*

CONCLUSION

For all the foregoing reasons, defendants respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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